National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: June 23, 1993

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Local 876, United Food & Commercial Workers (The Kroger Co.), Case 7-CB-95l8

536-258l-3328, 536-258l-6767, 536-6733-2500

This case was submitted for advice concerning whether the Union breached its duty of fair representation in violation of Section 8(b)(l)(A) by refusing to accede to the Employer's proposal to transfer an employee to another store as an accommodation to the employee's disability and by insisting that any accommodation be made in accordance with the seniority provision of the collective-bargaining agreement.

FACTS

The Employer operates a chain of grocery stores nationwide, including Michigan. Local 876 of the United Food and Commercial Workers represents all non-supervisory employees, excluding meatcutters, at Kroger stores in Wayne County and Monroe County, Michigan. The parties' current collective-bargaining agreement was effective on January l, l992.

For the past nine years, Charging Party David Lowe has worked as a clerk-cashier at the Garden City store, located in Wayne County. The Garden City store is 42 miles from his home in Monroe. He also has been a union steward at the Garden City store for the past three years. In about April l99l, Lowe developed a psychiatric condition diagnosed as a panic disorder, for which he has taken psychotropic medication and has been receiving therapy. Driving an automobile tends to precipitate these panic attacks. In October l99l, when the Employer learned of Lowe's condition, the manager of the Garden City store attempted to obtain for Lowe a transfer from the Garden City store to the Monroe store which is within walking distance of his home. At that time, the Employer's zone manager rejected this idea because the Employer could not afford another full-time employee at the Monroe store.

In July l992, Lowe also developed a grand mal seizure disorder for which he is taking medication. This latter condition prohibits him, as an epileptic, from driving an automobile for a specified period of time. By letter dated August l2, l992, Lowe requested that Kroger transfer him from the Garden City store to the Monroe store in order to accommodate his disability.

By letter dated September l6, Gerald Litman, the Employer's human resources representative, responded that transfers were limited by the contract and suggested a possible transfer under Article 23 of the contract, the energy clause, provided that another employee at the Monroe store was willing to switch stores with Lowe. [1] Litman also suggested the possibility of a transfer to a part-time position at the Monroe store. On September 24, l992, Litman and Lowe met to discuss options to accommodate Lowe's disability. Lowe indicated that he was not interested in a part-time position. Litman suggested seeking volunteers to transfer under the energy clause. Lowe agreed that the Employer would post a notice seeking transfer volunteers but not reveal that the reason was to accommodate his disability. They also discussed a possible forced transfer requiring a Monroe employee to transfer to Garden City in order to accommodate Lowe at the Monroe store, but only if the Union would agree.

By letter dated September 28, l992, Litman advised Lowe that there were no full-time openings at the Monroe store, that it was economically infeasible to create a new full-time position for him, and that no employees at the Monroe store had volunteered to switch jobs with Lowe. He also indicated that the Union had taken the position that Lowe could not take hours from other employees at the Monroe store and give them to Lowe because that would violate the collective-bargaining agreement. [2]

At about this time, the Employer offered Lowe a transfer to a store in Woodhaven, approximately 2l miles from his home. Lowe rejected this offer because, although the job was closer to his home, it still involved driving.

Lowe called the Union and was told that, in the Union's view, the ADA did not supersede the contract, and that the Employer would have to adhere to the contract terms as to any transfer.

On October l, l992 Lowe filed a charge with the EEOC alleging that the Employer violated the Americans with Disabilities Act (ADA) by refusing to transfer him to the Monroe store to reasonably accommodate his disability. On January 29, l993, Lowe filed an ADA charge against the Union alleging that the Union also refused to accommodate his disability. Those charge are still pending.

ACTION

We conclude that the Union did not breach its duty of fair representation in violation of Section 8(b)(l)(A) by refusing to agree to the Employer's proposed forced transfer and by insisting upon following contractual seniority provisions in order to accommodate Lowe's disability. Accordingly, the charge should be dismissed, absent withdrawal.

General Counsel Memorandum 92-9, Americans with Disabilities Act, 42 U.S.C. 12101, et seq., August 7, l992, p. 7 fn. 24, states that a union violates its duty of fair representation by discriminating against employees it represents based on "invidious" considerations such as disability, citing racial and sex discrimination cases. [3] The duty of fair representation requires a union to represent employees without regard to disability. [4] Therefore, a union which demonstrates "invidious motivation" in its conduct and would not have acted "but for" discriminatory reasons violates the duty of fair representation.[5]

However, in serving the bargaining unit, a union is allowed a wide range of reasonableness, "subject always to complete good faith and honesty of purpose in the exercise of its discretion." [6] Thus, a union may balance the rights of individual employees against the collective good, or it may subordinate the interests of one group of employees to those of another group, if its conduct is based upon permissible considerations. [7] If union conduct resolves conflicts between employees or groups of employees in a rational, honest, nonarbitrary manner, such actions may be lawful under Section 8(b)(l)(A) even if some employees are adversely affected by a union decision. [8]

Applying the above principles, there is insufficient evidence to find that the Union's refusal to agree to the Employer's transfer proposal and insistence that the seniority and transfer provisions of the contract be followed was motivated by discrimination against Lowe's disability. Rather, it appears that the Union has scrupulously adhered to the contract which is not discriminatory on its face. In addition, there is no evidence that it has treated other employees seeking non-contractual transfers differently from Lowe or acted contrary to any past practice.

Also, there is no evidence that the Union acted arbitrarily in declining to agree to the Employer's proposed accommodation. A transfer of Lowe to the Monroe store would have forced another employee to be transferred out of the Monroe store and could have adversely affected the working hours of other Monroe employees, which are scheduled on a seniority basis. Moreover, the Union apparently agreed with previous options offered by the Employer, including transfer to the Woodhaven store, an energy transfer under the contract, and a part-time transfer. It was Lowe, rather than the Union, that rejected the Woodhaven and part-time options. He also refused to permit his disability to be explained as a reason for the energy transfer, which may have encouraged a volunteer to come forward. Moreover, it was rational that the Union would be concerned that, if it agreed to Lowe's requested transfer, it could be flooded with grievances filed by other affected employees. [9] In these circumstances, the Union had a reasonable basis to decide that subordinating Lowe's interests to the interests of other unit members, as required by the contract seniority, was preferable. Accordingly, the Union's conduct which benefited one group of employees over Lowe was not unlawful.

The fact that the Union's conduct in this case may result in Lowe's inability to obtain the accommodation he desires under the ADA does not require a contrary result. The motivation of the Union, not the effect of its conduct, creates the basis for a breach of its duty of fair representation. [10] Any remedy which may exist for possible discrimination resulting from the Union's contractual seniority and transfer provisions is available under the ADA. [11]

In the absence of any evidence of discriminatory motivation, and in view of the Union's reliance on a colorable contract claim, we conclude that the Section 8(b)(l)(A) charge should be dismissed, absent withdrawal.

R.E.A.

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[1] Article 23 of the collective-bargaining agreement provides that, in order to conserve energy, full-time employees may switch jobs or transfer to a vacant position closer to their homes.

[2] Article 23 also provides that full-time employees can bump part-time employees, whose seniority is separate from full-time employees. There are several part-time employees at the Monroe store but their weekly hours total less than a 40-hour full-time position. Working hours at the Employer's stores are scheduled according to seniority.

[3] See e.g., Independent Metal Workers Union Local No. l (Hughes Tool Co.), l47 NLRB l573, l575-l575, l602-l604 (l964) (race discrimination); Bell & Howell Co., 230 NLRB 420, 420-423 (l977), enf'd 598 F.2d l36 (D.C. Cir. l979) (sex discrimination).

[4] Cf. Local l2, United Rubber Workers (Business League of Gadsden), l50 NLRB 3l2, 3l7 (l964) (racial discrimination).

[5] Id.

[6] Ford Motor Company v. Huffman, 345 U.S. 330, 338 (l953) (no breach of duty of fair representation by union agreement to contract clause that granted enhanced seniority to one group of employees, thus causing layoffs in another group of employees). See also Airline Pilots Association, International v. O'Neill, ___ U.S. ___, l36 LRRM 272l, 2724 (l99l), (breach of duty of fair representation only where union's conduct is so far outside a wide range of reasonableness "as to be irrational").

[7] Id.

[8] See Humphrey v. Moore, 375 U.S. 335, 348-349 (l964) (no breach of duty of fair representation where union resolved seniority dispute in favor of one group of employees over another). See also Airline Pilots Association, International v. O'Neill, supra.

[9] Airline Pilots Association, International v. O'Neill, supra (no 8(b)(l)(A) violation where union had rational concern that the course of action which it was rejecting would precipitate further litigation).

[10] Local l2 Rubber Workers (Business League of Gadsden), supra at 3l7.

[11] See 29 CFR l630.6 which applies to situations where an employer or union has a contractual relationship that has the effect of discriminating against employees with disabilities, whether or not the intent of the contractual relationship was to have the discriminatory effect.